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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-812

CHAMPION OIL SERVICE COMPANY, *Petitioner*

v.

SINCLAIR OIL CORPORATION, SINCLAIR REFINING COMPANY, AND ATLANTIC RICHFIELD COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
A. The Parties	3
B. Course of Proceedings	5
C. Statement of the Facts	6
1. Champion's arrangements with Sinclair	6
2. Sinclair's efforts to control Champion's volume	8
3. Sinclair's first step in taking control	14
4. Sinclair's second step in taking control	17
5. Sinclair's completion of the takeover	18
D. The Judgments Below	19
Reasons for Granting the Writ	21
Conclusion	35
Appendix:	
Opinion of the United States Court of Appeals for the Sixth Circuit	1a
Opinion of the United States District Court for the Southern District of Ohio Denying Sinclair's Motion for Judgment N.O.V. or for a New Trial	12a
Judgment of the United States Court of Appeals for the Sixth Circuit	19a

TABLE OF AUTHORITIES

Cases:	Page
Atlantic Refining Co. v. F.T.C., 381 U.S. 356 (1965)	26
Board of Trade v. United States, 246 U.S. 231 (1918)	22
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	23, 27
Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969)	23
Northern Pacific Ry. v. United States, 356 U.S. 1 (1968)	22, 23, 25
Osborn v. Sinclair Refining Co., 324 F.2d 566 (4th Cir. 1963)	26
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	28
Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968)	26
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	25
Standard Oil Co. v. United States, 337 U.S. 293 (1949)	24
Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961)	28
Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953)	30
United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)	28
United States v. Atlantic Richfield Co., 297 F. Supp. 1060 (S.D. N.Y. 1969)	4
United States v. Atlantic Richfield Co., 297 F. Supp. 1061) (S.D. N.Y. 1969)	4
United States v. Atlantic Richfield Co., 1970 CCH Trade Cases ¶ 73,820 (S.D. N.Y. 1970)	4
United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1952)	26
White Motor Co. v. United States, 372 U.S. 253 (1963)	29, 30

Statutory and Legislative Materials:

Emergency Petroleum Allocation Act of 1973, § 4(b)(1)(D), 15 U.S.C. § 753(b)(1)(D) (Supp. III 1973)	34
H.R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973)	34
S. Rep. No. 93-159, 93d Cong., 1st Sess. (1973)	34

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Petitioner, Champion Oil Service Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 29, 1974.

OPINIONS BELOW

The opinion of the court of appeals, reported at 502 F.2d 709, appears in the Appendix hereto at 1a. The opinion of the United States District Court for the Southern District of Ohio, Western Division, denying respondents' motion for a judgment notwithstand-

ing the verdict or the alternative relief of a new trial, not officially reported, appears in the Appendix hereto at 12a.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1974. By order of Mr. Justice Stewart, dated November 13, 1974, the time for filing a petition for writ of certiorari was extended to and including December 27, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, in setting aside a jury verdict in a private antitrust action challenging vertical arrangements, improperly compartmentalized the evidence and failed to review the evidence, especially that which showed anticompetitive intent, in the context of the wide ranging inquiry appropriate in Sherman Act rule-of-reason cases

2. Whether vertical arrangements which impose crippling restraints on local independent jobbers' freedom of action do not violate section 1 of the Sherman Act unless it is further demonstrated that there is consequent regional impact upon major integrated suppliers.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

A. The Parties

In 1946, Glenn E. Douglass became a wholesale and retail distributor of petroleum products by leasing a combination retail gasoline and bulk plant facility (I App. 43; Tr. 74).[1] Shortly thereafter, as his operations expanded to the distribution of fuel oil for heating homes, and wholesaling motor fuels to service stations and commercial accounts, Douglass formed a corporation, the Champion Oil Service Company ("Champion") (Tr. 80-81). As a result of innovative marketing techniques, Champion substantially expanded its business so that by 1958 it was operating two bulk plants and supplying twelve retail gasoline stations in Butler County, Ohio (Tr. 78, 86). By 1958, Champion's annual sales volume exceeded 6,000,000 gallons of gasoline products and fuel oil, which were marketed under the "Champion" brand at the same prices as were the national brands (I App. 43-44, 46, 126). In 1958, Champion's sales accounted for 39.86% of the independent jobber gasoline market and 48.4% of the independent jobber fuel oil market in Butler

[1] References to the "App." are to the Appendix of three volumes filed before the Court of Appeals for the Sixth Circuit. A single copy of the Appendix has been lodged with the Clerk of this Court. References to the "Tr." are to the transcript of the trial, which was part of the certified record on appeal.

County, Ohio. (I App. 236-237). Champion's share of unbranded gasoline in Butler County amounted to 87.79% and its share of unbranded fuel oil in the same market amounted to 94.49% (I App. 237-238).

Sinclair Refining Company was, prior to September 30, 1968, the wholly owned marketing subsidiary of the Sinclair Oil Corporation (I App. 17-18). On that date, the subsidiary was merged into the parent and the subsidiary's separate corporate existence ceased (I App. 17). As of the close of business on March 4, 1969, Atlantic Richfield Company and Sinclair Oil Corporation merged, with the former continuing as the surviving corporation after that date. At the time of the merger, Sinclair Oil Corporation and Atlantic Richfield Company were both "large integrated oil companies and [were] among the nineteen major integrated oil companies in the United States." *United States* v. *Atlantic Richfield Co.*, 297 F.Supp. 1061, 1064 (S.D. N.Y. 1969).[2] In 1967, Sinclair's total revenues exceeded $1.5 billion; at the same time its total assets exceeded $1.8 billion, ranking it

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[2] The merger was opposed by the Department of Justice which obtained a temporary restraining order, *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1060 (S.D. N.Y. 1969), and then a preliminary injunction, *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D. N.Y. 1969), blocking consummation of the merger. After changes in the details of the transaction and with Atlantic's assurances that it would preserve its ability to comply with any divestiture order, the preliminary injunction was vacated without opposition by the government. *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1075 (S.D. N.Y. 1969) Ultimately, by consent decree entered on August 28, 1970, Atlantic was ordered to divest the Sinclair gasoline marketing assets which it had acquired in fourteen specified states, as well as certain crude oil production, refining, and refined product transportation assets. *United States* v. *Atlantic Richfield Co.*, 1970 CCH Trade Cases ¶ 73,820 (S.D. N.Y. 1970).

thirteenth, and it ranked fifteenth in net earnings with net earnings exceeding $95 million. *See id.* In 1967, its refining capacity of 450,000 barrels per day accounted for just over 4% of domestic refining capacity, ranking it eighth among domestic refiners. *See id.* It then marketed gasoline throughout the United States with the exception of the far Western States.

Throughout these proceedings, Sinclair Refining Company, Sinclair Oil Corporation, and Atlantic Richfield Company have been collectively treated and referred to as "Sinclair." That collective treatment will be continued in this petition.

B. Course of Proceedings

This case began on July 15, 1969, when Champion Oil Service Company instituted an antitrust suit against Sinclair Oil Corporation, Sinclair Refining Company and the Atlantic Richfield Company alleging violations of the Sherman Act and Clayton Act. On December 31, 1969, the respondents filed their answer. After extensive pretrial preparations, which included pretrial briefs defining the legal and factual issues and an extensive stipulation of facts (I App. 42-129, 186-187), the trial court granted respondents' motion for partial summary judgment on October 6, 1972 (I App. 186-213). As a result of the trial court's disposition on summary judgment, a trial was held on whether the arrangements between Champion and defendants, including lease and leaseback arrangements, constituted a non *per se* violation of Section 1 of the Sherman Act as a contract or combination in unreasonable restraint of trade (I App. 213).

The court conducted a bifurcated trial on the issues of liability and damages. Between October 10 and 19,

1972, a trial was held on liability before a blue ribbon jury chosen by agreement of the parties. (Tr. 9-10). On October 19, 1972, after deliberation, the jury returned a verdict on liability in favor of petitioner by answering three special verdicts affirmatively (II App. 523-524, 692). Between October 26, 1972 and November 1, 1972, a trial was held on damages and on November 3, 1972, the jury, after deliberation, returned a verdict of $989,457 in favor of petitioner (II App. 692-693). Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, the verdict was trebled and a judgment in the amount of $2,968,371 was entered in favor of petitioner on January 2, 1973 (II App. 692-693). On May 10, 1973, the trial court denied the respondents' motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial (II App. 694-701).

The United States Court of Appeals for the Sixth Circuit reversed and remanded with instructions to the trial court to enter judgment notwithstanding the verdict dismissing the complaint (1a, 12a). The court of appeals concluded "that there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade." (11a).

C. Statement of the Facts

1. Champion's arrangements with Sinclair

During the period 1957-1958, Douglass was approached by the wholesale representative of Sinclair Refining Company with a view toward persuading Champion to become a Sinclair distributor in Butler County, Ohio (I App. 47, 238-239). Champion's reputation as a petroleum marketer was well-known and Sinclair was aware that "every major company

. . . would have liked to have had the account." (Tr. 440). Although Champion had been approached by other suppliers who could provide access to a national credit card, Douglass was particularly attracted to the Sinclair offer because of its highly publicized "estate building" program (I App. 239). The Sinclair "estate building" lease and leaseback program provided Champion with the prospect of eventually owning retail gasoline stations, which it had been unable to do in the past since it was growing faster than it was accumulating working capital (I App. 239).

A series of meetings between Sinclair representatives and Douglass were held to discuss an arrangement between the two companies (I App. 47, 326). As a result of the discussions, Champion entered a Sinclair distributor contract for Butler County (I App. 57). This agreement ran for a term of one year, continuing thereafter from year to year for up to ten years unless terminated by appropriate notice of either party prior to the end of any one year. In addition, Sinclair agreed to give Champion the "exclusive territory of Butler County" and leased to Champion ten of its then existing retail stations and turned over substantially all of its fuel oil business to Champion in Butler County (I App. 57-58, 275-276; Tr. 104-105). Sinclair also agreed to provide financial assistance for expanding Champion's business (I App. 275-277).

During the period from 1958 through 1963, Champion participated in the Sinclair "estate building" program and developed one existing and six new retail stations (I App. 240-241). Champion owned the six new stations which were secured with one hundred percent financing by bank loans and covered by fifteen

year mortgages (I App. 241). Sinclair was not a signatory to any of the note instruments to the banks or to the mortgages or deeds on the service stations. (I App. 258). However, it was Sinclair's policy to employ the fifteen year base lease approach even when a distributor did not require financing by a lending institution (I App. 329-330). Accordingly, on each of the seven stations, Champion executed fifteen year leases to Sinclair which were coextensive with the Champion notes to the banks on the stations. Champion assigned the rentals due it from Sinclair on these base leases, which were identical to Champion's mortgage payments to the banks (P. Ex. 6, III App. 1, 5). However, the base leases permitted Sinclair to offset any indebtedness owing from Champion to Sinclair against any rental obligations of Sinclair.

Simultaneously with the execution of the base lease on each of the seven stations, Sinclair leased back each station to Champion. (I App. 241-242; Tr. 102; P. Ex. 9, III App. 7, 8). Although the base leases to Sinclair on each of the seven stations were not cancellable for fifteen year terms, the leasebacks on each station were cancellable by Sinclair upon termination of the distributor agreement between Sinclair and Champion (I App. 242).

2. Sinclair's efforts to control Champion's volume

Champion's annual sales of gasoline and fuel oil increased under the Sinclair brand from 1958 through 1965. By 1965 Champion was supplying nineteen retail stations in that market—six stations owned by Champion and one land development station, which were under the "estate building" program; one station owned by Champion not under lease; six Sinclair stations remaining out of the group

turned over to Champion in 1958; and five third-party leases (I App. 255-256). Excluding the Sinclair stations, which accounted for about 700,000 gallons in 1965, Champion's share of the independent gasoline jobber market in Butler County was 40.49% (I App. 254-255). Champion's fuel oil sales accounted for 13.79% of all such sales in Butler County. (I App. 255).

Nevertheless, Champion began developing financial problems and suffered losses in 1965 (I App. 126; II App. 601-603). In the spring of 1965, Champion's cash flow problems heightened due to excess accounts receivables and the adoption of a meter reading program which increased cash demand. Douglass wrote Sinclair requesting financing assistance to work out the problems (I App. 64). Prior to this time Champion had issued several checks to Sinclair which had been returned for insufficient funds (I App. 64). On May 24, 1965, Sinclair refused to permit Champion to purchase petroleum products on other than a C.O.D. basis (I App. 65). As a consequence, Champion's cash shortage was accelerated and Champion began purchasing substantial amounts of gallonage from competing suppliers such as Sun Oil Company and American Oil Company (Tr. 197-198). Douglass advised Sinclair representatives, who were concerned that competing supplier petroleum products were being distributed through Sinclair "branded" stations, that it was a matter of self-preservation and it was either that or close the doors (Tr. 371-372). Champion was forced to purchase petroleum products from any supplier that was willing to give the company credit (I App. 332). Indeed, by the end of 1965, Champion was purchasing approximately 98% of its gallonage

needs from competing petroleum product suppliers who were willing to provide credit terms (I App. 128, 298).

On June 24, 1965, Sinclair officers held a meeting in Chicago to discuss Champion's financial problems and the fact that Champion was making substantial purchases of petroleum products from Sinclair's competitors (Tr. 372-373, 451-453). This had been one of the many meetings Sinclair officers held to discuss the problem of Champion purchasing petroleum products from Sinclair's competitors (Tr. 453). On June 30, 1965, the Sinclair officers had a meeting with Douglass to discuss Champion's financial problems and the fact that Champion was making substantial purchases from competing suppliers (I App. 66; Tr. 371-374). During the meeting on June 30, 1965, William R. Kelly, Sinclair's Regional Manager and Frank E. Treat, Sinclair's wholesale representative, were quite critical of Champion's outside petroleum purchases (Tr. 371-372). Subsequent to the meeting, Kelly emphasized to Treat that "we simply cannot condone a competitor's product going through our equipment" and "we should take whatever steps are necessary to safeguard our investment." (I App. 332; Tr. 372-374).

On July 3, 1965, Douglass wrote to Sinclair requesting a loan as a solution to its financial problems and indicated that Champion's current capital needs amounted to approximately $712,000.00. (I App. 67). Subsequently, a meeting was held in Sinclair's New York office to discuss Champion's request for a $700,000 loan (I App. 127). Douglass testified that, shortly after this meeting, he was advised in a telephone conversation with Mr. Harry H. Young, Vice-President of Sinclair, that Sinclair would not make the loan re-

quested. (I App. 246-247). Douglass stated that he had asked Young if Sinclair would release Champion from the leases and sales contracts so that Champion could approach another supplier for a distributorship and that Young retorted that this could not be done (I App. 247). Young could not recall this telephone conversation with Douglass (Tr. 476-477).

On August 31, 1965, William R. Kelly, Sinclair's Regional Manager, advised Mr. Vearl R. Gordy, Sinclair's Ohio State Manager, that the loan to Champion had been turned down and presented four alternative proposals with respect to the Champion situation "to retain representation and profitable gallonage in the Hamilton area . . . ." (P. Ex. 35, III App. 33). In discussing one of the alternatives, total purchase by Sinclair of all the Champion assets, Kelly observed that "Douglass would probably have difficulty selling the company to a competitive marketer without our leases on the fourteen stations." (P. Ex. 35, III App. 35). Likewise, although he recognized that the alternative of cancelling the base leases and retiring Champion's debt would "enable Douglass to sell the entire enterprise to a competitor at a higher price than Sinclair would be willing to pay," he recommended against this alternative "[i]n view of our profit estimate on the Fourteen stations" and because "[t]his would put us [Sinclair] out of business in the Hamilton area," (P. Ex. 35, III App. 35). Kelly also outlined the possibility of a partial purchase by Sinclair of the seven leased stations and the Hamilton bulk plant owned by Champion combined with a marketer arrangement, a proposal which would permit Sinclair "to hold the entire [Champion] volume on a dual basis." (P. Ex. 35, III App. 34).

During the latter part of 1965, Sinclair representatives focused on variations of the partial purchase proposal included in Kelly's recommended alternatives (Tr. 376-383; P. Exs. 36, 41, III App. 36 & 44). On September 10, 1965, Gordy proposed a partial purchase variation which was designed "[t]o protect our Company's interests insofar as retaining representation and profitable gallonage in the Hamilton area. . . ." (P. Ex. 36, III App. 36). This proposal included granting Champion the right to repurchase the properties, provided that Champion entered into lease and leaseback arrangements with Sinclair "to assure our control of representation and profitable gallonage." (P. Ex. 41, III App. 38). Indeed, Gordy emphasized in his September 10 recommendation that the proposal would accomplish retention of volume and excellent "control" over gallonage and future operations (I App. 343-344; P. Ex. 41, III App. 41).

On September 20, 1965, Douglass contacted Sinclair expressing frustration at Sinclair's delay in arriving at some form of settlement (P. Ex. 39, III App. 42). Reacting to this request, Gordy notified his superior that immediate action was required on Sinclair's part (P. Ex. 40, III App. 43). Gordy "strongly advocated" that Sinclair cancel Champion's distributor contract and retain the eight service stations owned by Champion (P. Ex. 40, III App. 43). Acknowledging that "there is more to this proposal than merely retaining eight service stations and cancellation of Distributor agreements," Gordy's position was a clear rejection of any partial purchase of Champion's assets. *(Ibid.)*

On January 6, 1966, Mr. R. T. Schroeder, Sinclair's Regional Manager of Distributor Sales, noted that he

favored a modified version of a partial purchase proposal since Sinclair:

> . . . will not only retain the business at these 14 service stations . . . but also save a total of 5,849,360 gallons, in addition to the 2,071,300 gallons that will be retained at the 14 retail outlets. Since last March price realizations in Champion's marketing area have improved considerably and would provide us with a nice profit; however, as you know 98% of their [Champion's] purchases have been made on the outside beginning with April of this year. This would be a nice piece of business to save and I wholeheartedly recommend to you and ask your support and approval. (P. Ex. 41, III App. 44, 48).

Schroeder's proposal did not include the lease/lease-back requirement in the event of Champion's repurchase as was contained in Gordy's earlier proposal. On January 22, 1966, Gordy sent a memorandum to Schroeder explaining that he could not recommend the partial purchase proposal outlined by Schroeder since there was no assurance that Champion could improve its profits, and:

> Further, what assurance do we have of Champion remaining as our branded distributor? If we purchase the service stations and resume lease obligations of those service stations we control by underlying lease, there is nothing to preclude Champion from obtaining additional re-financing from a competitor and consequent change of supplier (P. Ex. 45, III App. 49, 51).

In the interim, on January 18, 1966, Schroeder had conveyed to Douglass the basic terms of the partial purchase proposal except for the lease/lease-back condition in the event of Champion's repurchase (P. Ex. 18, III App. 23).

On January 25, 1966, Sinclair officers held a meeting to discuss the Champion situation. During the meeting Kelly proposed releasing all the stations owned by Champion to permit Champion to go to a competitive supplier upon receipt of payment of its account with Sinclair (P. Ex. 46; Tr. 519). Gordy proposed that Sinclair retain three of the stations and return only five to Champion. (I App. 354). At this meeting, a decision was made to permit Gordy to pursue his proposal with Douglass. If unsuccessful, Sinclair was to move in on all locations and cancel the distributorship arrangement (P. Ex. 46). On January 26, 1966, Gordy notified Douglass that Sinclair was withdrawing the partial purchase offer contained in Schroeder's letter of January 18, 1966 (Tr. 388-389; P. Ex. 19, III App. 25).

3. Sinclair's first step in taking control

On January 27, 1966, Champion notified Sinclair of the cancellation of the distributor agreement between Sinclair and Champion in an effort to break the deadlock in the negotiations (I App. 77, 251). On February 4, 1966, Gordy and Schroeder met with Douglass and agreed to release Champion from its distributor agreement prior to its expiration date (I App. 77). In addition, over Douglass' objection, they proposed to take back the six service stations, which originally had been Sinclair stations in 1958, and to cancel the leases to Champion on four of the stations owned by Champion (I App. 77, 251). Although Gordy indicated that the takeover would help alleviate Champion's problems, Douglass objected to the takeover of the ten stations since it would increase Champion's cost of operation (I App. 251-252). Gordy advised Douglass that he was authorized to take over

all the stations that Sinclair had leases on "so I better agree to the proposed four . . . ." (I App. 283).

On March 4, 1966, Kelly instructed Gordy that "unless the proposal presented by you and Mr. Schroeder is acceptable in all of its terms, then we should take back our leases and operate the stations in the manner proposed." (Tr. 403-404). Schroeder also directed Gordy, on March 4, 1964, to be prepared to move in and take over the fourteen service stations on April 1, 1966, noting that Sinclair would take over only ten stations if Champion was successful in working out a deal with a competing supplier. (P. Ex. 48, III App. 52). These instructions were consistent with the decision made earlier by Schroeder's superior, Howe, during the January 25, 1966, meeting (P. Ex. 46). Gordy later reported to the Sinclair management that the takeover "was orderly and without difficulty" and that Champion cooperated one hundred percent. (I App. 77-80). As a result of the takeover, Champion's annual gallonage went from 8 million to 6 million, which caused a reduction in gross profit and increased Champion's cost per gallon by a cent and a half on the remaining gallonage (I App. 259; Tr. 163). The three service stations that Sinclair permitted Champion to retain had a substantially lower investment return than the four service stations which were taken over by Sinclair (I App. 351-352). After April 1, 1966, Sinclair directly supplied the ten stations which had been taken over from Champion (I App. 370-371).

Sinclair was well aware at the time of the takeover of the ten stations that it would be virtually impossible for Champion to attract another supplier without its four best stations. As early as August 1965, Kelly stated that "Douglass would probably have difficulty

selling the company to a competitive marketer without our leases on the fourteen stations [eight Champion and six Sinclair stations]." (P. Ex. 35, III App. 35). Moreover, Kelly was aware that Champion wanted to make a deal with a competitor and that the more stations he had available "the more desirable his business would be for another supplier." (I App. 318). However, Kelly's proposal to release all the stations owned by Champion to permit it to go to a competing supplier was rejected at the January 25, 1966 meeting (P. Ex. 46).

After Sinclair advised Champion of the takeover of the ten service stations, three competitors of Sinclair, Sun Oil Company, Cities Service Oil Company (Citgo) and American Oil Company, ended their negotiations relating to distributor arrangements, which had begun in late 1965. On March 24, 1966, Citgo rejected a distributor arrangement with Champion based on a financial analysis of its Credit Department, which concluded that Champion was in a weak financial situation. (Def. Ex. F, II App. 100-102). This rejection was not communicated to Mr. Douglass at the time (I App. 304). Prior to the rejection, Citgo was aware that Sinclair had refused to refinance Champion (Def. Ex. F, III App. 100). The negotiations with Sun Oil Company, which had begun in 1965, developed to the point where Sun would undertake affiliation with Champion on a guarantee basis if Champion were able to get its financial house in order (II App. 473-475). Sun's representative had concluded that Champion needed $350,000 in order for an affiliation to develop (I App. 478). Sun had been interested in a Champion distributorship arrangement as early as 1962-1963 and continued its interest in

1965-1966 (I App. 129). One of the factors in the Sun interest was that Champion had purchased fuel oil from Sun in 1965 and 1966 (II App. 476).

4. Sinclair's second step in taking control

In June of 1966, Gordy of Sinclair indicated that it was his personal opinion that Champion could not survive (P. Ex. 50, III App. 53-54). Gordy was also aware that Citgo management had rejected a deal with Champion and that Champion's possibilities of developing a relationship with Sun Oil or American Oil were quite limited (P. Ex. 50, III App. 54). Gordy advised the Sinclair management that "If I can maintain the present relationship I believe we have an excellent opportunity to pick up much of the volume [of Champion] through one means or another." (P. Ex. 50, III App. 54). During this period Champion was operating on a month-to-month distributor agreement with Sinclair (I App. 83).

In September 1967, Gordy met with Douglass to discuss converting Champion to a commission marketer agreement, a transition which only occurred when a jobber was in trouble and its supplier wanted to gain control of the jobber's volume to prevent it from going to competing suppliers (I App. 259, 261). In August, Gordy had explained the purpose of converting Champion to the marketer arrangement to Sinclair management:

> First, we must take the proposed [commission marketer] route in order to acquire certain controls of the approximately six million gallons of light oils available in this market. This is an important factor (P. Ex. 51, III App. 51, 58).

Parenthetically, he noted that Sinclair had a moral obligation to aid Champion to survive its financial

predicament (P. Ex. 51, III App. 58), but the purpose of the conversion was the "opportunity to acquire six million gallons of profitable product annually at no cost to Sinclair . . . ." (P. Ex. 53, III App. 59, 61). Thus, on November 16, 1967, Gordy requested Sinclair management to be tolerant "until such time as we can get the total Champion volume under control . . . ." (P. Ex. 53, III App. 61).

5. Sinclair's completion of the takeover

In February 1968, Sinclair cancelled the commission marketer arrangement and converted the bulk of Champion's gasoline and fuel oil business to a direct operation with Champion's employees becoming salaried personnel of Sinclair and Sinclair leasing Champion's office space and equipment (I App. 374; Tr. 169-170). With enthusiasm Gordy later remarked that Sinclair had acquired "control" over "certain volume on a direct basis at no cost to our company." (P. Ex. 54, III App. 62, 63).

In a final effort to save his business, Douglass presented three proposals to Gordy with the request that Sinclair release Champion from the sales contracts and leases if none of the alternatives were acceptable to Sinclair (P. Ex. 21, III App. 28, 29). Gordy recommended against Champion's proposals because there were 3,300,000 gallons of petroleum product in the Champion operation which would not be controlled by Sinclair and which he feared could be diverted to a Sinclair competitor. (P. Ex. 57, III App. 65). Expressing moral and legal qualms about Sinclair capturing Champion's 2,300,000 gallon fuel oil business, Gordy recommended against releasing Champion from

its sales contracts and leases with Sinclair (P. Ex. 57, III App. 66).

On June 24, 1968, Sinclair delivered the final blow. Gordy advised Douglass that all his proposals were unacceptable (P. Ex. 59, III App. 67). Despite the fact that Champion's equity position in the stations that it owned was approximately $400,000 as of December 31, 1968 (I App. 107), Champion lost substantially all its business in Butler County. No longer a viable competitor in Butler County, Champion was left with its Dayton facility and continued to operate its burner and air-conditioning service business (I App. 270).

On the other hand, in capturing Champion's retail gasoline and fuel oil business, Sinclair obtained even more than it previously hoped for, when it considered purchase of some of Champion's facilities in September 1965 (I App. 380-381). Moreover, instead of paying Champion $720,000, as was proposed in 1965, Sinclair took over Champion's facilities and customers at little or no cost. (I App. 382-383).

D. The Judgments Below

After hearing the evidence and receiving the trial court's final instructions, the jury returned special verdicts in Champion's favor and, following the damages phase of the trial, assessed actual damages at $989,457; pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, the trial judge trebled the award and entered judgment for Champion in the amount of $2,968,371 (II App. 692-693). Sinclair's motion for judgment notwithstanding the verdict, or, alternatively, a new trial was denied (II App. 694-701). In denying this motion, the trial judge withdrew his reser-

vations on sufficiency of the evidence previously expressed at the time the motion for directed verdict was denied, noting that "the matter called to attention in plaintiff's final argument changed the court's mind on that subject." (II App. 699).[3]

Sinclair appealed on the grounds that (1) there was insufficient evidence to go to the jury, (2) that the trial court failed to exclude certain evidence introduced during the damage phase of the trial and, (3) that the trial court improperly refused to instruct the jury on its proferred *in pari delicto* defense. The court of appeals agreed with Sinclair's position on the first issue, reversing and remanding with instructions to enter judgment notwithstanding the verdict (12a). The court concluded "that there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade;" proof it regarded as essential in non *per se* cases. (11a) In light of this disposition, the court declined to reach Sinclair's other asserted grounds for reversal.[4] (11a)

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[3] The Court of Appeals quoted the trial judge's reservations but gave no indication that it was aware of his withdrawal of those reservations. (8a)

[4] If this Court grants the petition for a writ of certiorari we propose to argue that Sinclair's grounds for appeal not reached by the court of appeals would not have required reversal and that this Court should, unless it limits the grant of certiorari to the questions discussed herein, reinstate the verdict.

REASONS FOR GRANTING THE WRIT

The court of appeals was called upon to review a jury's determination that the extensive vertical arrangements between Champion and Sinclair were unreasonable restraints of trade which had damaged Champion in its business and property. In setting aside the verdict, the court single-mindedly focussed upon a single element of that arrangement, wholly ignoring the multifaceted inquiry well established as appropriate in rule-of-reason antitrust cases. It thereby disregarded the abundant evidence that the arrangement imposed crippling restraints upon Champion's freedom to select its suppliers in its own interests, ultimately removing Champion as an effective competitive force in the distribution of refined petroleum products in its own local market, as well as the overwhelming evidence that Sinclair intended to achieve this result. The court's sole concern was whether the proofs demonstrated an impact on Sinclair's major integrated competitors' operations over the region in which they did business. Accordingly, the writ should be granted to correct the court of appeals' departure from the rulings of this Court and from the accepted and usual course of judicial proceedings.

Involved herein is a series of contracts between Sinclair and Champion. Among these agreements were lease/leaseback agreements, which Champion considered as mere financing instruments and not a commitment for affiliation with Sinclair for 15 years. Nevertheless, the cancellation provisions of the leaseback agreements subjected Champion to the risk of loss of its stations if Champion dealt with other suppliers, and, when Champion did so, the cancellation provisions were used to force Champion into further damaging arrangements. The purpose and effect of the arrangements, as the record demonstrates, was to prevent Champion from extricating itself from its financial problems and to enable Sinclair to control Champion's facilities and customers.

In the instant case the jury was entrusted with the task of assessing the lawfulness of the restraints under

the rule of reason.[5] The appropriate inquiry under this approach is a wide ranging one:

> "[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918).

This Court has curtailed the inquiry only with respect to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1958). In all other instances, it has insisted that all relevant facts be exhaustively examined within the framework of the rule of reason. For example, where a plaintiff chal-

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[5] The role of a jury in weighing the sometime conflicting evidence presented over seven trial days in a complex antitrust case is arduous, but a role for which a jury is peculiarly suited. Accordingly, the court of appeals recognized that it was required to view the evidence in the light most favorable to [Champion] and . . . give it the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." (8a). This deference to the fact-finding responsibility of the jury was particularly appropriate in this case since, as the trial judge noted: "the jurors were hand-picked, every attempt was made to inform them appropriately as to the facts and the law, and they were extremely conscientious in the performance of their duties." (15a). Yet, through its restrictive view of the evidence and artificial analytical approach, the court of appeals evaded what it purported to recognize as the limited character of appellate review.

lenging a tying arrangement has not met the criteria for *per se* unreasonableness,[6] this Court emphatically rejected the notion that this failure was fatal to his case, noting that he "can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969).

In contrast with the comprehensive analysis required by the rule-of-reason, the court of appeals compartmentalized the evidence and narrowly conceptualized the instant case as fitting into the requirements contract mold. Once that had been done the court mechanically followed what it perceived to be the appropriate legal standard. This treatment is singularly inappropriate since the components of the arrangement are not to be tightly compartmentalized and separately scrutinized; the jury may, indeed must, evaluate the entire course of dealings between the parties. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). The evidence demonstrates a far more complex set of arrangements between the parties. Such evidence required the rule-of-reason analytical approach—one far more extensive than a single-minded insistence that the evidence reveal a restraint on Sin-

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[6] Tying arrangements are per se unreasonable "whenever a party has a sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 (1958).

clair's major oil company-competitors throughout the Southwestern Ohio area [7] (10a-11a).

Given the long and extensive relationship between the parties, the court of appeals was obligated to explore several factors in determining whether the jury's finding of unreasonableness had evidentiary support. However, various important paths of inquiry were not pursued. Wholly absent from the court's analysis was any consideration of the restraint which Sinclair imposed upon Champion's freedom of action in selecting the suppliers with which it would deal or any exploration of the availability of less restrictive alternatives. Indeed, as we demonstrate below, the evidence plainly shows that Sinclair rejected less restrictive alternatives to their course of action and proceeded with the primary objective of retaining "control" over Champion's gallonage, i.e., that Champion could not supply its account with gasoline purchased from others. This and other evidence bears upon the key issue — untouched by the court of appeals — of Sinclair's purpose and intent.

A striking omission on the part of the court of appeals was its disregard of the economic coercion

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[7] A corrollary of the court's erroneous belief that the case involved solely restraint upon competition between oil company suppliers, instead of competition at the levels at which Champion operated, is an erroneous concept of the relevant geographic area. The case presented to the jury concerned competition in Butler County at the jobber level, at the retail level, and in the sale of fuel oil to home owners in Butler County. The evidence shows that Sinclair consistently treated this as a Butler County problem and that its objective was to control Champion's business in Butler County. Moreover, as this Court has recognized, competition between major integrated refiners is directed towards securing the maximum number of strategically located retail outlets in any particular local market. *See Standard Oil Co.* v. *United States*, 337 U.S. 293, 304 n. 6 (1949).

which the proofs showed Sinclair to have utilized in its efforts to restrain Champion from distributing competing products. As this Court has long recognized, coercive vertical restraints are potentially unreasonable at the buyer or seller level. For example, tying arrangements conflict with the fundamental policies embodied in the antitrust laws, and are thus unreasonable, in part because "buyers are forced to forego their free choice between competing products." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 6 (1958).[8] In addition to such coercive practices which cut across industry lines, leverage through lease arrangements in the marketing of petroleum products has been the subject of judicial scrutiny, as in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), where a service station operator asserted that Union had utilized the cancellation provisions of station leases and consignment contracts to compel Union's dealers to adhere to retail prices which it set. Casting its analysis in terms of the overall arrangement, this Court noted that:

> "If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or *remain consignees,* and, in any event, to sell at competitive prices." *Id.* at 16. (emphasis added)

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[8] The other evil of tying arrangements articulated in *Northern Pacific* is that "they deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." *Id.*

The supplier's leverage accruing from short-term cancellation provisions in service station leases was again recognized in *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357, 368 (1965). There, these provisions were utilized to eliminate those dealers who refused to purchase substantial quantities of tires, batteries, and accessories (TBA) from the gasoline supplier's designee. *Id.* at 364-67.

The lower courts too, have not ignored lease provisions in this industry when coercively used and have condemned the resultant restraint upon the buyer. *See, e.g., Sahm* v. *V-1 Oil Co.,* 402 F.2d 69 (10th Cir. 1968); *Osborn* v. *Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963). Oral requirements contracts which the major oil company supplier enforced through the exercise of the 24-hour cancellation clause contained in its service station leases were struck down in *United States* v. *Richfield Oil Corp.,* 99 F.Supp. 280 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922 (1952). Again the court focused on the twofold evils of the arrangement—the station operators were denied their right to deal with other suppliers and other suppliers were denied the opportunity to compete for the operator's business. *Id.* at 293-94.

The common thread of these decisions is the recognition that such provisions are unlawful because they strike at the very heart of the economic system which the Sherman Act was intended to protect—freedom of independent business action. The court of appeals gave absolutely no consideration to the impact of the challenged practices upon Champion's freedom to select its suppliers in accordance with its own best business judgment, but viewed the sole relevant ques-

tion to have been whether Sinclair had foreclosed its competitors from the market.[9]

The proofs at trial clearly demonstrated Sinclair's coercive use of the contracts between the parties.[10]

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[9] The court of appeals asserted that "[t]here was no direct evidence or evidence from which it could properly be inferred that any other oil company refused to refinance Champion and accept it as a distributor because of the existence of the lease/leaseback agreements" (11a). The court there could have only been addressing the question of whether competition between major oil companies had been affected; since it had earlier acknowledged that this Court's holding in *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, required it to "view the evidence in the light most favorable to [Champion] and . . . give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably have been drawn." (3a). The record shows that Sinclair refused to release Champion's stations in favor of another supplier (I App. 247) and that in previous years various suppliers were actively interested in affiliation with Champion (II App. 473-75). Indeed Sinclair itself recognized that release of the stations was critical to Champion's ability to secure another supplier (PX 35, III App. 35). Thus, the jury could have properly concluded that release of the stations was an essential condition to Champion's financial recovery and that Sinclair's refusal to release the stations had destroyed Champion's ability to compete as the distributor for one of Sinclair's competitors. Moreover, the district court correctly observed that this inference was supported by Douglass' testimony to the effect that no oil company would seriously consider Champion as a jobber with its stations thus encumbered (17a-18a). In view of the fundamental principle which the court of appeals had explicitly recognized, its assertion could not have been intended to be taken literally.

[10] The absence of coercion on the part of Sinclair, found by the district court "at the outset" of the relationship to have been undisputed (I App. 192-93), does not preclude a finding that Sinclair at that time possessed an anticompetitive animus; nor is it dispositive on the question of leverage coercively exercised by Sinclair, in exploiting the constituent contracts at subsequent times.

Champion's solicitation of affiliation with Sinclair and ability to

Accordingly, the court of appeals' exclusive evidentiary focus upon supplier foreclosure at the regional level — arguably appropriate for evaluation of the annually renewable distributorship agreement alone, *see Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) — was far too simplistic an approach to the long course of dealings involved in the instant case.

As noted, *ante* at n. 10, the leaseback cancellation provisions were recognized in the industry as appropriate to protect a particular legitimate interest and therefore not inherently unreasonable. The relation between a restraint and valid business interest is a well recognized component of the rule-of-reason inquiry. In the classic statement of the rule quoted by then Circuit Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899):

> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether

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secure certain contractual provisions is no bar to challenging terms which Champion neither sought nor could have reasonably expected Sinclair to enforce under the circumstances as they later developed. *See Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968). Douglass' testimony, based upon some 30 years experience in the industry, was that since the lease/leasebacks were strictly financing instruments which enabled the mortgagee-bank to look to Sinclair's far more substantial assets as security on the fully financed mortgages, Sinclair had no legitimate reason to exercise the leaseback cancellation clauses and refuse to release the properties if Champion secured another company to assume Sinclair's purported derivative obligation to the lending institutions. (I App. 247-248) Douglass was therefore justifiably "a little bit aghast" at their refusal and expected to find "somebody who would know what [he] was talking about." (I App. 248).

> the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is in the eye of the law, unreasonable."

However, such protection is not to be judged in a vacuum for "the problem is not simply whether some justification may be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in the light of the extenuating interests." *White Motor Co.* v. *United States,* 372 U.S. 253, 270 (1963) (Brennan, J., concurring). Accordingly, the restraints became unreasonable when they were employed by Sinclair, not for those valid reasons, but as devices to penalize Champion for its purchases from alternate suppliers and, ultimately, to remove Champion as an effective competitive force in the Butler County market.

Sinclair's coercive and unreasonable use of the contracts involved to assure its "control" over Champion's gallonage, in addition to providing this evidence of unreasonable effect through the impairment of Champion's freedom to select its suppliers on the basis of independent business judgment, amply demonstrates Sinclair's anticompetitive purpose.[11] Accordingly,

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[11] Evidence that the effect of the arrangements was to unreasonably restrain trade is, in itself, sufficient to support the jury's determination that Sinclair violated Section 1 of the Sherman Act; concommitly, a showing that this facially reasonable restraint was "accompanied with a specific intent to accomplish a forbidden re-

the court of appeals' disregard of evidence bearing on coercion and justification for the restraint flawed their rule-of-reason inquiry on both issues. In resolving the business justification question, one "pertinent inquiry would explore the availability of less restrictive alternatives." *White Motor, supra,* 372 U.S. at 271. Of course, use of a restrictive provision when less restrictive alternatives are available may prove not only that the chosen provision is more restrictive than necessary but also that the purpose for its selection was not a legitimate one. This inquiry too escaped the court of appeals' attention, for it ignored the abundant evidence concerning Sinclair's conduct in August 1965, after it had turned down Champion's request for a loan. At that time Sinclair considered four alternative proposals to remedy Champion's financial problems (P. Ex. 35, II App. 33). One of the alternatives, purchase of all the Champion assets, would have given Sinclair all of the business and would have taken care of Champion's indebtedness without tying up Champion's remaining worth. Moreover, cancellation of the base leases and retiring Champion's debt would have protected Sinclair, but this was rejected because "[t]his would put us [Sinclair] out of business in the Hamilton area." (P. Ex. 35, III App. 35).

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straint" would also support the verdict. *See Times Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 614 (1953). Contracts may be found illegal when an unreasonable restraint of trade is either their object or effect. Id. However, as with the issue of coercion, proofs are not so neatly severable into "effect evidence" as opposed to "purpose evidence"—evidence generally bears on both questions and proof of one supports an inference of the existence of the other. In the instant case, we need not make this virtually metaphysical determination, for there was ample evidence from which the jury could have found both an anticompetitive purpose and an anticompetitive effect.

Another alternative was a partial purchase, that is, purchase of some of Champion's properties. Sinclair officials recognized that this alternative would have left Champion in control of the remaining stations: "If we purchase the service stations and resume lease obligations of those stations we control by underlying lease, there is nothing to preclude Champion from obtaining additional re-financing from a competitor and consequent change of supplier." (P. Ex. 45, III App. 49, 51). The jury could have inferred that one or more of these less restrictive alternatives was feasible from a financial standpoint and that Sinclair chose the most restrictive device in order to control Champion's gasoline and fuel oil business. This inference is virtually compelled by the abundant evidence which directly reveals Sinclair's purpose throughout the critical 1965-68 period.

When Champion's financial problems began to heighten in 1965, Sinclair placed Champion on a C.O.D. basis; Champion had no alternative but to purchase 98% of its product needs from Sinclair's competitors who were willing to provide Champion with credit (I App. 128, 298, 332). Sinclair's representatives were quite concerned that Champion was making substantial purchases of petroleum products from Sinclair competitors (Tr. 371-372). Sinclair was unwilling to tolerate this situation and was anxious to take whatever steps were necessary to correct this problem (I App. 332; Tr. 372-374). Sinclair's concern could not have been directed towards the quality of the competing product since in the past Sinclair had directed Champion to pick up product, for resale under the Sinclair brand, at competitors' terminals whenever it suited Sinclair (I App. 242-243).

Following Sinclair's action in refusing Champion's requested loan, Sinclair's own documents reveal a consistent predatory motive which was corroborated by their relentless takeover of Champion's business. There was extensive evidence that Sinclair's primary concern was to gain control of the Champion volume and to preclude Champion from going to a competing supplier (P. Ex. 41, III App. 44, 48; P. Ex. 45, III App. 49, 51). The first step in accomplishing its goal was the takeover of four retail stations owned by Champion and covered by the lease/leaseback arrangements. If Champion was unwilling to accede to the takeover, Sinclair was prepared to take over all of the stations and operate them on a direct basis (P. Ex. 46; P. Ex. 48, III App. 52; Tr. 403-404). However, this first maneuver did not achieve control over all the Champion volume. Therefore, in 1967 Sinclair converted Champion to a commission marketer arrangement with the purpose and intent of gaining control over approximately six million gallons of product under the Champion umbrella (P. Ex. 51, III App. 51, 58; P. Ex. 53, III App. 59, 61).

Shortly after the commission marketer arrangement had been instituted, Sinclair converted Champion to a salaried personnel operation and rejected Champion's request to be released from the lease/leaseback arrangements (I App. 374; Tr. 169-70). The reason for this conversion was because "this volume could be diverted from our company by Mr. Douglass . . . ." (P. Ex. 57, III App. 64, 65).

Sinclair was very effective in achieving its goal of gaining control over the Champion volume. Indeed, one of the key figures behind Sinclair's maneuvers commended the Sinclair management for its support

since Sinclair had acquired "control" over "certain volume on a direct basis at no cost to our company" (P. Ex. 54, III App. 62, 63).

Confronted with the substantial evidence of Sinclair's anticompetitive intent during the period 1965-68, the jury could have reasonably inferred that Sinclair had initiated its relationship with Champion in 1958 with that purpose, thereby satisfying the court of appeals' apparent insistence that there be temporal coincidence of intent and contract. Accordingly, their special verdict finding that Sinclair had entered into the contracts with the purpose and intent to foreclose competition was not, as the court of appeals viewed the matter, devoid of evidentiary support. Indeed, its conclusion is reinforced by proof which linked Sinclair's intent during the latter period with Sinclair's purpose in establishing the contractual relationship with Champion (I App. 269, 332, 397-398).

As we have demonstrated above, the court of appeals fundamentally misconceived the broad inquiry demanded by the antitrust laws by insisting that Champion could not prevail without proving that Sinclair's major integrated competitors also felt the force of the blows which crushed Champion. This insistence was singularly inappropriate in light of the evidence which showed Sinclair's deliberate and coercive exploitation of ostensibly reasonable instruments to achieve its unlawful end. Unless set aside by this Court, the decision below gives major integrated oil companies license to utilize conventional land-financing and other long-term instruments to purposefully impose their will on local independent marketers and destroy those who insist upon their independence. Such practices are not legalized merely because the mark-

eter's affiliation was not totally valueless.[12] The antitrust laws forbid such practices, sanctioned by the court of appeals, which enable major integrated suppliers to present independent marketers with the bleak choice of taking product exclusively from the supplier throughout the duration of these long-term instruments or becoming landlord to someone who will. The need for this Court's intervention is underscored by the explicit Congressional recognition that

> "the independent branded and non-branded distributor[s] of refined petroleum products . . . have an importance to the United States economy far out of proportion to their market shares, because they continually spur the major integrated firms to improve their own efficiency in the production, refining, transportation and marketing of products." H. R. Rep. No. 93-531, 93d Cong., 1st Sess. 18 (1973). *Accord,* S. Rep. No. 93-159, 93d Cong., 1st Sess. 24 (1973).[13]

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[12] After asserting that "[t]he estate-building features of the lease/leaseback arrangement appear to have been the chief reason for Champion's decision to affiliate with Sinclair," the court of appeals noted that Champion had received Sinclair's rental payments under the base leases and had built up equity in the leased premises (11a). The fact that Champion "enjoyed" the prospect of eventually owning the properties after paying insurance, maintenance, and taxes over the term of the respective mortgages is irrelevant to the basic question of whether the arrangement unreasonably restrained trade.

[13] This concern was expressed in the specific context of assuring adequate supplies of product to this sector of the industry during times of shortage. Accordingly, Congress directed that the allocation regulations mandated by the Statute must "to the maximum extent practicable . . . preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers." Emergency Petroleum Allocation Act of 1973, § 4(b)(1)(D), 15 U.S.C. § 753(b)(1)(D) (Supp. III 1973).

Specific statutory protection of the independent sector of this industry from one form of predation should not be undermined by judicial hobbling of the full sweep of the Sherman Act's more general proscription of practices designed to achieve the same ends.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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